

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

TYRONE KEYS,

Plaintiff/Counter-Defendant,

v.

BERT BELL/PETE ROZELLE NFL
PLAYER RETIREMENT PLAN and the
NFL PLAYER DISABILITY &
NEUROCOGNITIVE BENEFIT PLAN,

Defendants/Counter-Plaintiffs.

Case No. 8:18-cv-02098-CEH-JSS

**EMERGENCY JOINT MOTION FOR EXTENSION OF TIME
TO FILE DISPOSITIVE MOTIONS**

Defendants Bert Bell/Pete Rozelle NFL Player Retirement Plan (“Retirement Plan”) and NFL Player Disability & Neurocognitive Benefit Plan (“Disability Plan” and together with the Retirement Plan, “Plans”) and Plaintiff Tyrone Keys file this emergency¹ motion for an extension of time to file dispositive motions currently due on October 4, 2019 under the Court’s Amended Case Management and Scheduling Order, Doc. 37. Still pending before this Court are (1) the Plans’ Motion to Dismiss Count Three of Keys’ First Amended Complaint (Doc. 28); (2) the Plans’ Motion to Compel Written Discovery and Deposition Testimony (Doc. 42); (3) Keys’ Motion for Protective Order Regarding Defendants’ Subpoenas of Plaintiff’s Bank

¹ Under L.R. 3.01(e), “motions of an emergency nature may be considered and determined by the Court at any time, in its discretion”. The Plans believe this motion warrants emergency designation due to the dispositive motion deadline of October 4, 2019. Although Keys joins in this motion, Keys does not agree with the designation of the motion as an emergency motion.

Records (Doc. 44); and (4) Keys' Motion for Leave to File First Amended Answer to Defendants' Counterclaims (Doc. 46). As discussed below, without rulings on these motions, the parties are unable to effectively and efficiently brief dispositive motions. Accordingly, the Court should extend the deadline to file dispositive motions to prevent manifest injustice.

RELEVANT BACKGROUND AND ARGUMENT

Keys filed this action against the Plans seeking to overturn the Plans' decision to reduce and then turn off his monthly disability benefits, as well as seeking to recover additional disability benefits under the Plans. *See, generally*, Compl., Doc. 1; Am. Compl., Doc. 35. After the Court granted in part and denied in part the Plans' motion to dismiss, Doc. 28, the Plans answered the Complaint and filed Counterclaims, Doc. 39. Two of the Counterclaims seek equitable relief under ERISA section 502(a)(3), including the imposition of a constructive trust, on account of overpayments made by the plans to Keys. Countercls., Doc. 39, at 21, 32. Keys answered the Plans' Counterclaims, asserting an affirmative defense that, *inter alia*, the Plans "are barred from bringing an equitable claim for recovery of . . . overpayments . . . because they seek recovery from Plaintiff's general assets and have not identified any fund that is traceable to the alleged overpayment[s]" Pls.' Answer, Doc. 40, at 7-9.

On June 28, 2019, the Plans served written discovery on Keys regarding (1) the amount of disability benefit overpayments to Keys, and (2) whether Keys has funds or assets traceable to the disability benefit overpayments. On July 29, Keys objected to the Plans' discovery requests, and also will not voluntarily appear for deposition. On August 12, the Plans moved to compel Keys to substantively respond to the Plans' discovery requests and to appear for deposition (Doc. 42). Keys opposed that motion (Doc. 45).

On August 5, 2019, the Plans also served third party subpoenas on Synchrony Bank and Suncoast Credit Union, banking institutions that may have relevant information relating to the existence of Keys' assets traceable to the Plans' overpayments. On August 18, Keys filed a motion for a protective order regarding the third party subpoenas (Doc. 44). The Plans opposed that motion (Doc. 47). Both banks provided documents in response to the Plans' subpoenas; however, the Plans have not reviewed the responses and documents pending resolution of Keys' Motion for Protective Order.

On August 27, 2019, Keys filed a motion for leave to file an amended answer to the Plans' counterclaims (Doc. 46). Specifically, Keys seeks to add the affirmative defense to his answer to Counts II and III of the Plans' counterclaims that the Plans' documents do not allow the Plans to seek equitable relief to recover the overpayment to Keys because the Retirement Plan is already withholding Keys' future disability benefit payments as a form of offset. *See, generally*, Plaintiff's Motion for Leave to File First Am. Answer, Doc. 46. The Plans opposed Keys' motion (Doc. 48).

It would be manifestly unjust to require the parties to file (and respond to) dispositive motions without the benefit of the Court's rulings on the motions relating to the parties' discovery disputes, or Keys' motion to amend his answer to the Plans' counterclaims. *See, e.g., Rail Trusts Locomotive Leasing, LLC v. SunCoke Energy, Inc.*, 2016 WL 8929072, at *5 (M.D. Fla. Oct. 25, 2016) (court granted plaintiffs' motion to extend discovery and dispositive motions deadline because, *inter alia*, plaintiffs were unable to conduct discovery on defendant due to defendant's motion to dismiss and objections to discovery). The Court's ruling on these issues will impact whether the Plans are permitted to use the discovery they obtained from the banks,

as well as conduct additional written and deposition discovery of Keys.² And, the inclusion of an affirmative defense by Keys regarding whether the Plans' documents permit the Plans to seek equitable relief here would necessitate additional briefing in the dispositive motions.

Additionally, extending the deadline until after the Court's rulings on these key motions is the most efficient use of the parties' and the Court's resources, as it would avoid the need for multiple rounds of briefing and streamline the parties' dispositive motions to only the issues that remain after the Court's rulings.

To prevent manifest injustice, as well as to make the most efficient use of the parties' and the Court's time and resources, the Court should extend the deadline to file dispositive motions until 21 days after both (1) the Plans have completed discovery pursuant to this Court's orders, or the Court rules that the Plans are not entitled to discovery on their Counterclaims, and (2) the Court has ruled on the Plans' motion to dismiss Count Three of Keys' First Amended Complaint and Keys' motion to amend his answer to the Plans' Counterclaims.

CONCLUSION

For the foregoing reasons, the Court should extend the deadline to file dispositive motions until 21 days after both (1) the Plans have completed discovery pursuant to this Court's orders, or the Court rules that the Plans are not entitled to discovery on their Counterclaims, and (2) the Court has ruled the Plans' motion to dismiss Count Three of Keys' First Amended Complaint and on Keys' motion to amend his answer.

² In filing this motion, neither party concedes any of their arguments with respect to discovery in this matter, and expressly reserves its right to make all arguments regarding the same.

Dated September 30, 2019

By:

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